

APPEAL NO. 030712  
FILED APRIL 30, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 19, 2003. The record closed on February 25, 2003. The hearing officer resolved the disputed issues by deciding that: (1) respondent/cross-appellant (claimant) sustained a compensable injury on \_\_\_\_\_, in the form of a repetitive trauma occupational disease; (2) claimant's compensable injury extends to and includes her cervical spine, thoracic spine, and lumbar spine; (3) the compensable injury does not include her left shoulder; (4) appellant/cross-respondent (carrier) waived its right to contest compensability; and (5) claimant had disability from July 11 through July 18, 2001, from July 27 through August 12, 2001, and from August 20 through October 30, 2001. Carrier appeals the hearing officer's determinations regarding injury, disability, and carrier waiver. Carrier notes that Conclusion of Law No. 4 regarding the extent of injury is inconsistent with both Finding of Fact No. 4 and the decision portion of the decision and order. Claimant responded, urging affirmance of the determinations challenged by carrier. In her cross-appeal, claimant seeks reversal of the hearing officer's determination that the compensable injury does not extend to the left shoulder.

DECISION

We affirm as reformed.

**COMPENSABLE INJURY AND DISABILITY**

The hearing officer did not err in his determinations on the issues of occupational disease injury and disability. Conflicting evidence was presented on these issues. We do not agree with carrier's assertion that Texas Workers' Compensation Commission Appeal No. 92272, decided August 6, 1992, and Texas Workers' Compensation Commission Appeal No. 93305, decided May 26, 1993, were similar to the present case and illustrated that claimant failed to meet her burden of proof. In the present case claimant testified about the repetitive movements required by her job. The history noted in the medical records also indicates that the mechanism of injury involved repetitive twisting and bending at the waist. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established from the evidence presented. We conclude that the hearing officer's determinations on the issues of occupational disease injury and disability are supported by sufficient evidence and are not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W. 2d 175 (Tex. 1986).

## **CARRIER WAIVER**

We first note that we disagree with carrier's contention that the hearing officer "seems to be stating that the only reason that the Claimant had a compensable injury to her thoracic area was because of the Carrier's waiver . . . ." Carrier cites Continental Casualty Company v. Downs, 81 S.W.3d 803 (Tex. 2002), and asserts that a waiver in this case would create an injury where there is none. We reject this contention. The hearing officer determined that there is damage or harm to claimant's body in this case. The hearing officer specifically found that claimant sustained an injury from repetitive trauma to the cervical, thoracic, and lumbar regions of her spine. The hearing officer noted in his Statement of the Evidence that claimant's description of her movements, the medical reports from Dr. L, and the x-rays showed claimant had an injury to her thoracic spine, so compensability of the thoracic injury was not created solely by waiver.

Carrier appeals the hearing officer's conclusion that it waived the right to contest compensability in this case. Carrier asserts that Downs should not be applied retroactively. However, we have already rejected a similar assertion in Texas Workers' Compensation Commission Appeal No. 023061, decided January 28, 2003. The hearing officer determined that carrier received written notice of the claimed thoracic injury on July 11, 2001, but it did not contest compensability until July 20, 2001. The hearing officer noted that carrier did not initiate benefits before July 20, 2001, and carrier did not assert that it took any action within the seven-day period. See Texas Workers' Compensation Commission Appeal No. 030380-s, decided April 10, 2003. We conclude that the hearing officer did not err in determining that carrier waived its right to contest compensability in this case.

## **EXTENT OF INJURY**

Carrier correctly notes that the language contained in Conclusion of Law No. 4 is inconsistent with Finding of Fact No. 4 and the decision portion of the decision and order. The hearing officer noted in his Statement of the Evidence that clinical findings in evidence provided ample support for the neck, thoracic, and low back injuries. There is sufficient evidence to support the finding that claimant's compensable injury extended to her cervical spine. The hearing officer noted that the clinical findings of the treating chiropractor "provided ample support for the neck, thoracic, and low back injuries." Claimant was diagnosed in August 2001 with cervical radiculitis and cervical myofascitis. From a complete reading of the decision and order, it appears that the failure to include the cervical spine as part of the injury was a mere clerical error. We reform Conclusion of Law No. 4 to read as follows: The Claimant's compensable repetitive trauma injury in the form of an occupational injury as of \_\_\_\_\_, does extend to and include an injury to the middle back area in the thoracic region of the Claimant's spine and the cervical spine, but does not extend to nor include an injury to her left shoulder. We note that in other findings, the hearing officer also found that the injury includes the low back/lumbar spine.

Claimant requests reversal of the hearing officer's determination that the compensable injury did not extend to include her left shoulder. Extent of injury is a fact question for the hearing officer. Texas Workers' Compensation Commission Appeal No. 960407, decided April 10, 1996. In view of the evidence presented, we conclude that the hearing officer's determination that the compensable injury did not extend to include claimant's left shoulder is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain, *supra*.

As reformed, we affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **FIRE & CASUALTY INSURANCE COMPANY OF CONNECTICUT** and the name and address of its registered agent for service of process is

**CORPORATE SERVICES COMPANY  
800 BRAZOS STREET  
AUSTIN, TEXAS 78701.**

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Judy L. S. Barnes  
Appeals Judge

CONCUR:

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Daniel R. Barry  
Appeals Judge

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Gary L. Kilgore  
Appeals Judge